# Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-58-95
GOPAL SRI RAM, SITI NORMA YAAKOB AND ABDUL MALEK JJCA
27 FEBRUARY 1996

***Civil Procedure*** *— Striking out — Want of prosecution — Inordinate and inexcusable delay — Prejudice to defendant — Whether court had inherent jurisdiction to strike out action upon application of any interested party — Whether a discretionary matter for trial judge — Whether circumstances of case supported inference that plaintiff lacked interest in case*

***Civil Procedure*** *— Appeal — Interference by appellate court — Discretion exercised by trial judge — General principle*

In 1982, Hongkong Bank (M) Bhd ('the bank') issued a writ against the respondents. The bank obtained several orders including an order for early trial. Thereafter, no steps were taken by the bank, and the matter lay dormant for the next ten years. In 1992, the respondents applied to have the suit struck out for want of prosecution before Ong See Seng J, but they were unsuccessful. Their appeal to the then Supreme Court was also dismissed on 27 April 1993. However, the Supreme Court made an additional order directing the suit to be heard before a different High Court judge within a month, failing which the bank's suit would be struck out. Purporting to act on the order of the Supreme Court, the bank wrote to the High Court a letter dated 5 May 1993, seeking to fix the suit for hearing in May. Unfortunately, the bank failed to appraise the High Court of the actual terms of the Supreme Court order or to place the order before the court. On 14 May 1993, the senior assistant registrar of the High Court informed the bank that the suit could not be heard in the month of May because Ong See Seng J would be away. It was obvious that the registrar and the judge were unaware of the terms of the order made by the Supreme Court, but the bank did not clarify the position. In October 1993, the parties were informed that the suit would be heard in April 1994 before the same judge. The bank took out a summons for an order that the suit be fixed for hearing, albeit unnecessarily, and the respondents applied for an order to strike out the suit pursuant to the Supreme Court order. Both summonses were heard together. The respondents' application was allowed, and the bank's application was dismissed. The bank appealed to the Court of Appeal. The issue was whether the judge had correctly interpreted the order of the Supreme Court when he struck out the suits. The bank contended that, in resolving that question, the Court of Appeal should confine itself solely to the events that transpired between the date of the Supreme Court's order and the orders made

by the judge. The respondents contended that the court should have regard to the whole history of the case.

**Held**, dismissing the appeal:

(1) When interpreting the order made by the Supreme Court, the court should not confine itself solely to the events which transpired between the date of the Supreme Court order and the orders made by the judge but should have regard to the whole history of the case, to determine the purpose of the order of the Supreme Court (see pp 40G–I and 41A–C); *Heydon's case* (1584) 76 ER 637 followed.

(2) The principle that governs this appeal was that every superior court had inherent jurisdiction to strike out actions of plaintiffs who had been guilty of inordinate delay in prosecuting them. The power may be exercised *suo motu* or upon the application of any interested party (see p 42D).

(3) There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial. Thus, the prejudice that will occur when a case is required to be tried several years after its institution and the occurrence of the events giving rise to the alleged cause of action is in itself a ground for striking out an action. In the present case, there is the added consideration that the bank paid lip service obedience to the order of the Supreme Court (see p 44C).

(4) The circumstances of the present case, taken as a whole, fairly support an inference that the bank was not really interested in the cases it had filed. Therefore, there was no plausible reason for allowing the suits to remain on file (see p 44D); *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 followed.

(5) At the end of the day, what was in issue was essentially the exercise of discretion by the trial judge. The present case did not fall within any of the categories of cases which entitled appellate interference. There was no error in principle in the judgment of the trial judge. The judge appeared to have been conscious of the purpose behind the order of the Supreme Court and the long delay that the bank had been guilty of in prosecuting the suits. His interpretation of the Supreme Court's order was entirely correct. There had, accordingly, been no misdirection by the judge of himself upon any point (see p 44F); *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 followed.

**[Bahasa Malaysia summary**

Dalam tahun 1982, Hongkong Bank (M) Bhd ('bank tersebut') telah mengeluarkan satu writ terhadap penentang-penentang. Bank tersebut telah memperolehi beberapa perintah, termasuk satu perintah untuk perbicaraan awal. Walu bagaimanapun, selepas itu, tidak ada langkah

yang telah diambil oleh bank tersebut, dan perkara itu telah terpendam selama sepuluh tahun berikutnya. Dalam tahun 1992, penentang-penentang telah memohon supaya guaman itu dibatalkan atas ketiadaan pendakwaan di hadapan Ong See Seng H, tetapi mereka tidak berjaya. Rayuan mereka kepada Mahkamah Agung pada masa itu juga telah ditolak pada 27 April 1993. Walau bagaimanapun, Mahkamah Agung telah membuat satu perintah tambahan yang mengarahkan supaya guaman itu dibicarakan di hadapan seorang hakim Mahkamah Tinggi yang lain dalam tempoh satu bulan, dan kegagalan berbuat demikan akan menyebabkan guaman-guaman bank tersebut dibatalkan. Dengan tujuan untuk bertindak atas perintah Mahkamah Agung, bank tersebut telah menulis sepucuk surat kepada Mahkamah Tinggi bertarikh 5 Mei 1993, meminta agar guaman itu ditetap untuk pembicaraan dalam bulan Mei. Akan tetapi, bank tersebut telah gagal memberitahu Mahkamah Tinggi atas terma sebenar perintah Mahkamah Agung atau mengemukakan perintah itu kepada mahkamah. Pada 14 Mei 1993, penolong kanan pendaftar Mahkamah Tinggi telah memberitahu bank tersebut bahawa guaman itu tidak dapat dibicarakan dalam bulan Mei oleh sebab Ong See Seng H tidak akan hadir. Adalah nyata bahawa pendaftar dan hakim tidak mengetahui terma perintah yang telah dibuat oleh Mahkamah Agung, akan tetapi, bank tersebut tidak menjelaskan kedudukan tersebut. Dalam bulan Oktober 1993, pihak-pihak telah diberitahu bahawa guaman itu akan dibicarakan dalam bulan April 1994 di hadapan hakim yang sama. Bank tersebut telah mengambil satu saman untuk perintah bahawa guaman itu ditetapkan untuk pembicaraan, walaupun perbuatan itu tidak diperlukan, dan penentang-penentang telah memohon untuk suatu perintah membatalkan guaman itu menurut perintah Mahkamah Agung. Kedua-dua saman telah didengar secara bersama. Permohonan penentang-penentang telah dibenarkan, dan permohonan bank tersebut telah ditolak. Bank tersebut telah merayu kepada Mahkamah Rayuan. Isunya ialah sama ada hakim telah mentafsir perintah Mahkamah Agung dengan betul apabila beliau membatalkan guaman itu. Bank tersebut berhujah bahawa, dalam menyelesaikan soalan itu, Mahkamah Rayuan harus membataskan diri hanya kepada peristiwa yang berlaku antara tarikh perintah Mahkamah Agung dengan perintah-perintah yang telah dibuat oleh hakim. Penentang-penentang pula berhujah bahawa mahkamah harus mengambil berat terhadap sejarah keseluruhan kes itu.

**Diputuskan**, menolak rayuan:

(1) Ketika mentafsir perintah yang telah dibuat oleh Mahkamah Agung, mahkamah tidak harus membataskan diri hanya kepada peristiwa yang berlaku di antara tarikh perintah Mahkamah Agung dan perintah-perintah yang dibuat oleh hakim tetapi harus mengambil berat terhadap sejarah keseluruhan kes itu, untuk

mengetahui tujuan perintah Mahkamah Agung (lihat ms 40G–I dan 41A–C); *Heydon's case* (1584) 76 ER 637 diikut.

(2) Prinsip yang menguasai rayuan ini adalah bahawa setiap mahkamah atasan mempunyai bidang kuasa sedia ada untuk membatalkan tindakan plaintif-plaintif yang bersalah atas kelewatan yang terlampau dalam pendakwaan. Kuasa itu boleh dilaksanakan *suo motu* atau atas permohonan mana-mana pihak yang berkepentingan (lihat ms 42D).

(3) Defendan yang mempunyai suatu tindakan yang belum dibicarakan bagi tempoh masa yang tidak pasti, dan tidak tahu bila ia akan dibicarakan, mengalami banyak prejudis. Justeru itu, prejudis yang berlaku apabila suatu kes perlu dibicarakan bertahun-tahun selepas ia dimulakan dan berlakunya peristiwa yang menimbulkan kausa tindakan yang dikatakan itu sendirinya merupakan satu alasan untuk membatalkan sesuatu tindakan. Dalam kes ini, terdapat pertimbangan tambahan bahawa bank tersebut telah berpura-pura mematuhi perintah Mahkamah Agung (lihat ms 44C).

(4) Keadaan-keadaan kes ini, diambil secara keseluruhannya, menyokong secara adil inferens bahawa bank tersebut tidak berapa berminat dalam kes-kes yang ia telah failkan. Oleh yang demikian, tiadanya sebarang sebab yang munasabah untuk membenarkan guaman kekal atas fail (lihat ms 44D); *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 diikut.

(5) Kesudahannya, apa yang menjadi isu adalah pada dasarnya pelaksanaan budi bicara oleh hakim perbicaraan. Kes sekarang ini tidak dirangkumi oleh mana-mana kategori kes-kes yang memberi hak kepada masuk campur rayuan. Tidak terdapat kesilapan prinsip dalam penghakiman hakim perbicaraan. Hakim nampaknya sedar akan tujuan di sebalik perintah Mahkamah Agung, dan kesalahan bank atas kelewatan dalam mendakwa guaman-guaman itu. Pentafsiran beliau adalah betul pada keseluruhannya. Ekoran itu, tiadanya salah arah oleh hakim atas dirinya pada mana-mana perkara (lihat ms 44F); *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 diikut.

[*Editorial Note*: The appellant has applied for leave to appeal to the Federal Court vide Civil Application No 08–18–96(A).]

**Notes**

For cases on striking out of actions for want of prosecution, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue), paras 72–78.

For cases on an appellate court's review of a discretion exercised by a lower court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue), paras 346–358.

**Cases referred to**

*Heydon's case* (1584) 76 ER 637
*Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150

**Appeal from**: Civil Suit No 135 of 1982 (High Court, Ipoh)

*Paul Kwong (Evelyn Khoo & Mohd Sharil Tarmizi* with him) *(Azman Davidson & Co)* for the appellant.
*Hira Singh (Asbir Hira Singh & Co)* for the respondent.

*Cur Adv Vult*

*27 February 1996*

**Gopal Sri Ram JCA** (delivering the judgment of the court): This case has a long and chequered history. However, the record provided has none of the relevant cause papers nor indeed a complete chronology of all the relevant events that transpired in the action. We have, therefore, *ex abundanti cautela* and in the interests of justice, called for and examined some of the cause papers and the minutes in the files of the two civil suits to ascertain what had actually transpired between the date of issue of the writ and the more recent events to which the appellant has attempted to restrict us in the consideration of this appeal.

It all began when in 1982, the appellant (whom we shall throughout this judgment refer to as 'the bank') issued a writ against the respondents in Civil Suit No 127–82. Initially, the bank displayed a great deal of interest in the matter. It obtained several orders, including an order for early trial. That order was made by Ajaib Singh J (as he then was) as long ago as 2 July 1982. Later that year, on 20 November 1982, the bank obtained an order for directions, including an order consolidating Civil Suit No 127–82 with Civil Suit No 135–82. But the bank's initial interest in the matter appears to have waned.

Thus, although it obtained an order for directions in November 1982, it took no steps to extract the order made on its application. Ultimately, it was the respondents' solicitors who extracted that order. Further, the bank did nothing to act upon the order for early trial made in July 1982. And for the best part of ten years, the consolidated suits lay dormant.

Not unnaturally, the respondents were keen on putting a speedy end to the litigation that was hanging over their heads. So, in 1992, they applied to have the actions struck out, but failed before Ong See Seng J. An appeal by them to the Supreme Court (which was heard on 27 April 1993) also proved unsuccessful. However, the Supreme Court, when dismissing their appeal made the following additional order:

> And It Is Further Ordered that the trial of the consolidated suits in the High Court be heard before another judge within one month (in May 1993) and in the event the respondent fails to comply with this order then the consolidated suits in the High Court be struck out with costs here and below.

A Even this order was not timeously extracted by the bank's solicitors. In the end, it was the respondents' solicitors who extracted it. There is some correspondence upon it to which we will refer momentarily.

Returning to the chronology of events, the bank, purporting to act on the order of the Supreme Court wrote to the secretary to
B Mohtar Abdullah J, the then senior judge in the High Court at Ipoh, a letter dated 5 May 1993, which, when shorn of its formalities, reads as follows:

> We act for the respondents (plaintiffs) in the above matters, respectively.
>
> We also refer to the letter dated 11 July 1989 (ref: [119] Civil Suit No
> C 127–1982, copy enclosed) from the High Court, Ipoh.
>
> The above appeals to the Supreme Court were heard on 27 April 1993 in Ipoh. The Supreme Court dismissed the appeal in respect of 'want of prosecution', and stated that steps be taken to fix the suit for hearing in May 1993 before the High Court, Ipoh failing which the appellants (defendants) are at liberty to strike off the suit for want of prosecution (by making a
> D second such application against our clients).
>
> In the circumstances, we earnestly appeal to his Lordship to fix the suit for hearing this month.
>
> We shall appreciate very much your prompt attention on the matter.

On 13 May 1993, the respondents' solicitors wrote to the bank's solicitors
E a letter which contains the following material paragraphs:

> We refer to the above matters and the letter dated 5 May 1993 addressed to the private secretary to his Lordship, the High Court judge in Ipoh, a carbon copy of which was extended to us on 11 May 1993.
>
> Please let us have the draft of the orders of the Supreme Court for our
> F approval so that you can then produce that order to the court.
>
> Your letter to the learned judge does not give the full picture of the orders made by the Supreme Court.

This letter crossed the bank's solicitors' letter of the same date, which was to the following effect:

G

> We refer to your clients' above appeal in respect of want of prosecution which was dismissed by the Supreme Court on 27 April 1993.
>
> We would like to know whether it is your clients' intention to extract the order of the court thereof. If we do not hear from you within the next five days from today, we shall proceed to extract the same.

H On 14 May 1993, the senior assistant registrar of the High Court, Ipoh wrote, informing the bank's solicitors that the suits could not be heard in the month of May because Ong See Seng J would be away on long leave.

It is plain from this letter that the registrar and the senior judge were unaware that the Supreme Court had, in its order, directed the suits to be
I heard before a judge other than Ong See Seng J. However, the bank did nothing to clarify the position and was quite content to let matters rest. Had it placed the order of the Supreme Court before the registrar or appraised the High Court of the actual terms of the order made by the

Supreme Court, those responsible for the scheduling of cases in the High Court, Ipoh would not have been labouring under the misapprehension that the suits had to be heard by Ong See Seng J, to whose court they had been originally assigned. A

A substantial part of the month of June 1993 was spent in the parties quibbling over the terms of the order made by the Supreme Court on 27 April 1993. The bank, however, took no further steps to inform the High Court at Ipoh that the suits were not meant to be heard before Ong See Seng J, and that they ought to be scheduled before another judge. B

By a letter dated 25 October 1993, the deputy registrar of the High Court, Ipoh informed the parties that the suit would be heard on 25 April 1994 in court No 2 which, we were advised by counsel for the respondent, was Ong See Seng J's court. It is fairly obvious that even at this point in time, the High Court at Ipoh had not been appraised of the terms of the order made by the Supreme Court some six months earlier. C

On 15 April 1994, the bank's solicitors wrote to the deputy registrar of the High Court, Ipoh requesting that the hearing scheduled on 25 of that month be vacated on the ground that the solicitor having conduct of the matter had taken ill. The hearing did not proceed as scheduled as the learned judge was not available. D

On 27 June 1994, the bank's solicitors took out a summons praying for an order that the suit be fixed for hearing. We observe that such an application was unnecessary, and added nothing to the state of affairs that had prevailed theretofore. E

On 21 October 1994, the respondents' solicitors took out a summons to strike out the suits 'pursuant to the order of the Supreme Court dated 27 April 1993 vide Civil Appeal No 02–123–1992'. F

Both summonses came on for hearing before Ahmad Fairuz J (as he then was) on 27 October 1994 and he, having heard the arguments of counsel, allowed the respondents' application and struck out the suits. The bank's application, in consequence, was dismissed. It is against these orders of the judge that the bank has appealed to us. We heard this appeal on 2 January 1996 and reserved judgment. G

Counsel for the respondent has raised a number of arguments before us, most of which were highly technical and entirely irrelevant. We are of the view that the only relevant question before us is whether the learned judge was correct in the interpretation he placed upon the order of the Supreme Court when he struck out the suits. Counsel for the appellant has H argued that in the resolution of this question, we ought to confine ourselves solely to the events that transpired between the date of the Supreme Court's order and the orders made by the learned judge which are the subject matter of this appeal. On the other hand, respondents' counsel has argued that we ought not to be so confined in our review of the background I to the suits. He says that we must have regard to the whole history of the case, including those facts adverted to by the bank.

We think that there is merit in the submission made by Encik Hira Singh of counsel for the respondents. In our judgment, it would be wrong

for us to wear the kind of blinkers suggested by the bank when considering the merits of this appeal. It must not be overlooked that the order of the Supreme Court was made against the background of what had previously transpired in the suits. Can we then shut our eyes to that background when we come to interpret the order of the Supreme Court? We do not think we are entitled to do that.

In taking the course suggested by the respondents' counsel, for which he cited no authority, we act by analogy with the course a court takes when interpreting a statute. Ever since *Heydon's case* (1584) 76 ER 637, courts are obliged to look at the historical background to a statute in order to ascertain the purpose for which it was enacted. In much the same way — although it is not a statute — do we approach the order of the Supreme Court in this case, to see its purpose.

As we have earlier observed, the enthusiasm with which the bank approached the suits in question at the early stages of litigation waned with the passage of time. Their lack of interest in the matter is evinced by the way in which they have conducted this litigation. We would, in particular, make the following comments:

(1) the suits were filed in 1982. Despite an order for early trial being made in July 1982 and directions having been given in November of the same year, no steps were taken to act upon these. The bank did not even bother to extract the order for directions;

(2) for a period of ten years, no steps appear to have been taken to approach the court to fix the suits for hearing;

(3) the Supreme Court made its order on 27 April 1993 directing the suits to be heard in May of that year. The seriousness with which the Supreme Court viewed the matter and the urgency which it attached to it are reflected in the short period of time that was allowed for the disposal of the suits. Yet, the bank did nothing until 5 May 1993. The lapse of time between the making of the order by the Supreme Court and the date on which the bank acted may be only a few days. However, in the context of the level of urgency with which parties and the High Court were called upon to act does not excuse any delay, save for the most exceptional of reasons. The order of the Supreme Court was made at its sitting in Ipoh. As disclosed in the correspondence, the bank's solicitors are in Ipoh. Counsel for the instant appellant was present when the order was pronounced and must therefore be taken to be aware of its terms. It is therefore incomprehensible why the bank's solicitors could not have written to the High Court at Ipoh on the very same, or even the next day, asking for a date in May;

(4) even when they wrote to the High Court in early May, the bank's solicitors did not communicate the terms of the Supreme Court order. They were aware that Ong See Seng J was not meant to deal with the suits. Yet they did not mention this vital fact. With respect, they proceeded in a rather lackadaisical manner. They failed to address their minds sufficiently to the certain delay that their letter

would cause. Of course, the registry of the High Court would, unless it was otherwise advised, reassign the suits to Ong See Seng J, although he was never meant to hear them. This is precisely what happened. It would not have been so if those having conduct of the matter on behalf of the bank had been diligent;

(5) in the months that went by, nothing was done to correct the erroneous impression that had formed in the mind of the deputy registrar. Meaning no disrespect, this certainly reflects a 'couldn't care' attitude on the part of the bank and its legal advisers. Had there been a genuine desire to carry the order of the Supreme Court into effect, one would have found a more careful approach to the language in which the letter of 5 May 1993 was cast.

Counsel for the respondents' cited several authorities on the consequences that flow from a breach of the terms of a peremptory or 'unless order'. With respect, none of them are really relevant to the facts of the present appeal. The principle that governs this appeal, we apprehend, is that every superior court has inherent jurisdiction to strike out actions of plaintiffs who have been guilty of inordinate delay in prosecuting them. This power may be exercised *suo motu* or upon the application of any interested party. The authorities that support this proposition are legion and we find it quite sufficient to quote from one of them.

In *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150, Abdoolcader J (as he then was) when delivering the judgment of the then Federal Court said (at pp 150–151):

> It would perhaps be more convenient and appropriate in this case to transpose the normal sequence and deal with the principles of law arising for consideration and application to the facts of the matter before adverting to the history and factual background of these proceedings. The principles involved pertain to the dismissal of an action for want of prosecution and the circumstances in which an appellate court will interfere with the discretion of a court of first instance.
>
> *(a) Dismissal of action for want of prosecution*
>
> The House of Lords in *Birkett v James* [1978] AC 297, approving the decision of the English Court of Appeal in a trilogy of appeals reported *sub nomine Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, held that the power of the court to dismiss an action for want of prosecution should be exercised only where the plaintiff's default had been intentional and contumelious or where there had been inordinate and inexcusable delay on his or his lawyers' part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant but, other than in a case of contumelious conduct on the plaintiff's part, should not normally be exercised where the delay had not extended beyond the end of the limitation period for the cause of action, and the House further observed per curiam that where a defendant is seriously prejudiced by a writ being issued long after the cause of action has accrued, albeit within the limitation period, the plaintiff must thereafter pursue his action with diligence and the action can only be dismissed (after expiry of the limitation period) for want of prosecution if the delay subsequent to the issue of the writ exceeds the

time limits prescribed by the rules of court and is inordinate and inexcusable having regard to the delay before the issue of the writ, and the delay after the issue of the writ has caused some additional prejudice to the defendant beyond that already suffered by him by reason of the delay in bringing the action. The House of Lords in *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corp Ltd* [1981] 1 All ER 289, again restated and discussed these principles but held they do not apply to arbitration proceedings.

We would specifically refer to the propositions enunciated by Salmon LJ in *Allen* (at p 268) to the effect, inter alia, in relation to the inordinate delay being inexcusable that as a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable, and again with regard to the question of serious prejudice to defendants by the delay, that this may be prejudiced at the trial of the issue between themselves and the plaintiff or between each other or between themselves and third parties, and that as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial. The decision of the English Court of Appeal in *Biss v Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* [1978] 1 WLR 382 (distinguishing *Birkett* on a point under the English Limitation Acts 1939 to 1975 not material for the purposes of the present appeal) is to the effect that in determining whether the delay after the writ had been issued is substantial, the court has to consider whether the delay has prejudiced both a fair trial and the defendants, and in considering the prejudice to the defendants, the delay after the issue of the writ has to be considered against the delay before issue, and whether such delay has substantially prejudiced the defendants. We would draw particular attention to the judgment of Lord Denning MR, stating (at p 389) that prejudice to a defendant by a plaintiff's delay is not limited to the death or disappearance of witnesses or their fading memories or in the loss or destruction of records since there is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.

*(b) Review of discretion by an appellate court*

There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co v Johnston* [1942] AC 130 at p 148 per Lord Wright). The Privy Council held in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v Bartlam* [1937] AC 473.

The House of Lords, approving the decision of the English Court of Appeal in *Ward v James* [1966] 1 QB 273, held to the same effect in *Birkett* (at pp 317, 326). For good measure, we would refer to the felicitous expression of Goulding J, in *Re Reed (a debtor)* [1979] 2 All ER 22 on this point (at p 25):

> '... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower

court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.'

In our judgment, the prejudice that will occur when a case is required to be tried several years after its institution and the occurrence of the events giving rise to the alleged cause of action is in itself a ground for striking out an action. In the present case, there is the added consideration that the bank paid lip service obedience to the order of the Supreme Court.

The circumstances of the present case, when taken as a whole, fairly support an inference that the bank is not really interested in the cases it has filed. There is, therefore, no plausible reason for allowing these suits to remain on file.

Having come to the foregoing conclusion, we have examined the judgment of the learned judge with a critical eye and find no error in principle therein. We observe that the judge appears to have been conscious of the purpose behind the order of the Supreme Court, and the long delay that the bank has been guilty of in prosecuting the suits. His interpretation of the Supreme Court's order is entirely correct. There has, accordingly, been no misdirection by the judge of himself upon any point.

It must not be forgotten that, at the end of the day, what is in issue is essentially the exercise of discretion by the learned judge. The principles upon which an appellate court will interfere in a case such as this are clearly set out in the judgment of the Federal Court in *Vasudevan v T Damodaran & Anor*. The present case does not fall within any of the categories of cases which entitles appellate interference.

Accordingly, for the reasons we have given, we are left with no alternative but to dismiss this appeal. All orders made by the judge are hereby affirmed. The appellant bank will pay to the respondents the costs of and occasioned by this appeal. The deposit lodged in court by the appellant shall be paid out to the respondents to account of their taxed costs.

*Appeal dismissed.*

Reported by Choo Siew Ling